occurred. The court below had charged the jury that the railroad company only contracted to carry the passenger safely, provided she kept within the cars—that it was for the jury to say whether her elbow was out of the cars at the time it was injured; and if it was, then it was a fact from which they might infer want of ordinary care on her part. The defendant nad moved the court to instruct that if the jury found that the plaintiff's arm was outside the window when the injury was received, it was an act of negligence, and she could not recover. The chief question in the Appellate Court was whether the refusal of this instruction was error. That it was a correct statement of the law was not questioned in the Court of Appeals, either in the argument or in the opinion of the court. Indeed, the opinion is quite to the contrary; but there was held to have been no error in its refusal, for the sole reason that the lower court had charged the jury substantially in accordance with the request, and was right in declining to repeat it.

It cannot be necessary to cite authorities in support of the views upon this subject already announced in this opinion. We content ourselves with a reference to *Todd* v. *The Old Colony Railroad Co.*, 3 Allen 18, and *The Catawissa Railroad Co.* v. *Armstrong*, 49 Penn. St. 186, for a clear and forcible statement of the law upon the subject as it has been long settled.

Judgment reversed, with costs. Cause remanded for new trial.

In *Pittsburgh, &c., Railroad Co.* v. *McClurg*, ante, p. 277, the Supreme Court of Pennsylvania having occasion to consider the same point, came to the same view of the law, as the court in the preceding case, and expressly overruled the case of *New Jersey Railroad Co.* v. *Kennard*, 9 Harris 203, which had decided differently.

J. T. M.

Supreme Court of Illinois.

COLE *v.* VAN RIPER.

The Illinois Statute of 1861 giving a married woman exclusive control of her property, declaring that the same shall "be held, owned, possessed, and enjoyed by her, the same as though she was sole and unmarried," and exempting it from execution or attachment for the debts of her husband, does not give to her the

power of conveying her real estate without the consent of her husband manifested by joining in the deed.

Although the effect of the statute is substantially to abolish the life estate of the husband in his wife's lands, during their joint lives, accruing to him by virtue of the marital relation, and also to abolish, during the life of his wife, his tenancy by the courtesy in her lands, in all cases where the title has been acquired by her since the passage of the statute, it does not abolish the tenancy by the courtesy after the wife's death, but leaves it unimpaired in the husband.

THIS was an action of ejectment, and the question presented by the record was, whether, under the law of 1861, known as the Married Woman's Act, a married woman can convey real estate, acquired since that time, without the joinder of her husband.

That act provides:

"That all the property, both real and personal, belonging to any married woman, as her sole and separate property, or which any woman hereafter married, owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith, from any person other than her husband, by descent, devise, or otherwise, together with all rents, issues, increase, and profits thereof, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and be held, owned, possessed, and enjoyed by her, the same as though she was sole and unmarried; and shall not be subject to the disposal, control, or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

The opinion of the court was delivered by

LAWRENCE, J.—The legislature has here used very sweeping language, but it must be interpreted with reference to the evil intended to be cured, and in such manner as to be made to harmonize with other statutes which are left unrepealed, so far as such harmony can be secured without disregarding the legislative intent. It is a familiar maxim, that repeal by implication is never favored.

That this statute cannot be enforced, according to its literal terms, without impairing, to a very large extent, the strength of the marriage tie, will be evident on a moment's reflection. By the terms of the act the property of a married woman is to be "under her sole control, and to be held, owned, possessed, and enjoyed by her the same as though she was sole and unmarried." If this language is to receive a literal interpretation, a married woman, living with her husband and children, in a house owned by her, would have the right to forbid her husband to enter upon the premises, and he would be a trespasser in case he should enter against her will, and would be liable to her in damages. Such

would be her rights as a *feme sole*. The wife could thus divorce her husband *a mensa et thoro*, without the aid of a Court of Chancery. Or, again, suppose in a house thus owned and occupied, the furniture is also the wife's property, can she forbid the husband the use of such portion as she may choose, allow him to occupy only a particular chair, and to take from the shelves of the library a book, only upon her permission? This would be all very absurd, and we know the legislature had no idea of enacting a law to be thus interpreted. It is simply impossible that a woman married should be able to control and enjoy her property as if she were sole, without leaving her at liberty practically to annul the marriage tie at pleasure; and the same is true of the property of the husband, so far as it is directly connected with the nurture and maintenance of his household. The statute cannot receive a literal interpretation.

The object of the legislature was not to loosen the bonds of matrimony, or create an element of constant strife between husband and wife, but to protect the latter against the misfortunes, improvidence or possible vice, of the former, by enabling her to withhold her property from being levied on and sold for the payment of his debts, or squandered by him against her wishes.

Before the passage of this law, the husband became the owner, by virtue of the marriage, of the personal property held by the wife at the date of the marriage, or which came to her after that time, and was reduced by the husband to possession, and he was also seised of an estate, during coverture, in lands held by the wife in fee. This estate was in the eye of the law a freehold, as it would continue during their joint lives, and might last during his life, and was liable to be sold on execution against the husband: 2 Kent 136. The personal property reduced to possession, and this estate in the wife's land, were at the disposal of the husband, and liable to be sold at his pleasure, for his own use, or to be levied upon and sold by his creditors. These were the evils which the law was designed to cure and has cured. Although we held in *Rose* v. *Sanderson*, 38 Ill. 247, that where the husband's estate in the wife's lands had vested before the passage of this law, it was not divested by the act, and might be sold by his creditors, yet where the marriage has occurred, or the land has been acquired by the wife since that time, it would, doubtless, be held that this species of estate, known as an estate during coverture,

has been substantially abolished, because its existence is wholly irreconcilable with both the language and the objects of this law. But besides this estate which the husband acquired, by virtue of the marriage, in the lands of his wife, he also, if there was issue of the marriage born alive, became tenant by the *courtesy* of all lands of the wife which such issue might, by possibility, inherit; and this estate, unlike the other, terminated only with his own life. The law termed this estate *initiate* on the birth of issue, and *consummate* only on the death of the wife; but the *initiate* estate could be seized and sold on execution against the husband. Up to the period of the wife's death, it was substantially the same thing as the estate during coverture above mentioned. Now, although this estate is greatly modified by the Act of 1861, it is not totally destroyed. During the life of the wife, the husband can exercise no control over his wife's lands as tenant by the *courtesy*, nor has he an interest in them subject to execution. We refer, of course, to lands where no interest had vested before the passage of the law. This estate, then, would be totally abolished, like the estate during coverture, were it not that tenancy by the *courtesy* continued after the wife's death, and indeed at that period became most material to the husband, since, up to that time, he had the enjoyment of his wife's realty by virtue of the other species of estate. While, then, the one estate is annihilated by a necessary implication, the utmost that can be said in regard to the other is, that it is materially modified. This estate is as old as the common law. It has always been recognised as existing in this state. It is not expressly abolished by the Act of 1861, and, so far from being abolished by implication, it may be recognised as taking effect on the death of the wife, without conflicting, in the slightest degree, with the letter, spirit, or object of that law. On the contrary, the law itself provides, that it is "during coverture" that the property of the wife is clothed with these new qualities, thus leaving the existing law unchanged, as to the disposition of the wife's property at her death. Moreover, it is hardly to be supposed that the legislature would totally abolish this estate, without remodelling that of dower; or that they would work so important a change in our law of realty, merely by implication. But, in fact, there is not even an implication that affects this estate after the death of the wife.

We have said this much in regard to this estate, as a founda-

tion for our opinion that this act does not enable the wife to convey her land without the consent of her husband manifested by joining in the deed.

At common law the wife could only convey by fine or a common recovery, and a fine levied without the husband was not binding upon him: 2 Kent's Com. 150. A conveyance in which the husband unites has been substituted in this country, and is the mode pointed out by the 17th section of our statute of conveyances. The estate of the husband in the wife's lands could not therefore be destroyed or impaired by the sole act of his wife. If this section of our Conveyance Act is repealed by the Act of 1861, it is repealed by implication, which, as already remarked, the law does not favor. But where is the implication? Not certainly in the language of the act, which gives the wife the right to hold, own, possess, and enjoy her property, for these terms give only the *jus tenendi*, and not the *jus disponendi*. The power to own and enjoy, is entirely different from the power to dispose of, and the latter is not necessary to the exercise of the former. Neither is the power of disposing implied in that phrase of the law directing that her property shall be under her sole control, because that term, although indefinite, must be construed in connection with the terms, "own, hold, possess, and enjoy." In order that she may hold and enjoy, she must necessarily control. But the control of the use and enjoyment does not imply the power to sell. Strictly speaking, the land, when conveyed, would pass away from her control and enjoyment.

But the chief reliance seems to be placed on the provision that she is to have the power of controlling and enjoying as if she were sole and unmarried, and hence it is contended that she can convey as if she were sole, and her deed would have the same effect as the deed of a *feme sole*. If she can convey at all, because of the language in the act referring to the condition of a *feme sole*, her deed would undoubtedly have this effect, and would thus destroy the husband's estate by courtesy, and prevent him from recovering possession of the lands conveyed after her death.

We have already given the reason why this act does not annihilate the estate of a tenant by the courtesy, or place it in the power of a wife to destroy it. If we are right in that conclusion, it necessarily follows that it was not the intention of the

legislature, when they gave her the power to enjoy as a *feme sole*, to give also the right to convey as a *feme sole*, and thereby destroy the husband's estate.

There is another reason for not holding that this act enables the wife to convey by her own deed. Before the passage of the law, acts similar in their general character had been passed in several of our sister states. The law of New York expressly gave the wife the power of conveyance.

The laws of Pennsylvania and New Jersey did not, but employed terms of the same general character as our own. Our legislature chose to shape our law after the latter models. It is but a just inference that the omission of any words, in our act, expressly giving the power to convey, was the result of design, and not of accident.

The Supreme Courts of Pennsylvania and New Jersey have given to the acts of those states the same construction adopted in this opinion: *Walker* v. *Reamy*, 36 Pa. State Rep. 410; *Naylor* v. *Field*, 5 Dutch. 287.

We should add, in conclusion, that we have not considered the question of the power of the wife to dispose of her personal property. That may depend upon different considerations. The power to sell has sometimes been considered a necessary incident to the ownership of personal property.

But a majority of the court are of opinion that the Act of 1861 does not authorize a married woman to convey her realty in any other manner than that pointed out by the Statute of Conveyances. In holding this, however, we do not question the rule laid down in *Emerson* v. *Clayton*, 32 Ill. 393, as to the right of a married woman to bring a suit in her own name. That right is a necessary incident to the law.

As the decision of this question disposes of this case, it is unnecessary to consider the other questions raised. The judgment is reversed, and the cause remanded.

BREESE, C. J., dissents.